

counsel has been unable to prepare sur-rebuttal evidence under any condition involving an emergency, the Examiner will hear such a statement. But any other statement would appear to the Examiner to be out of order.

MR. MYSE: I don't understand what the word "emergency" [21220] means, but if I do understand it, this is an emergency, and it is as follows: That if we were able to prepare the testimony that I mentioned, we would be able to refute without a doubt Exhibit 421—

MR. GOLDBERG: Now, Mr. Examiner, may I interpose here? I understand that the Examiner has ruled that he will not listen to an offer of proof or will not hear an offer of proof with respect to testimony which is not prepared; that if it is prepared, he is willing to have the witness called.

What the Examiner will listen to is to a detailed specification of the material they say they are in the process of preparing.

MR. MYSE: That is exactly what I want to tell the Examiner at this time.

TRIAL EXAMINER: I do not think anything would be added to the record by receiving a detailed statement of what Respondents' counsel is in process of preparing if he is not now ready to present whatever testimony or evidence is in the process of preparation.

Once again, if there is any matter that has intervened since the Examiner first directed Respondents' counsel to put on his sur-rebuttal testimony and evidence that has prevented the regular course of preparation of that testimony and evidence, he may state what that was.

MR. MYSE: That is also what I intended to state by [21221] reciting in detail what the evidence would be, and pointing out why we have been unable to prepare it.

TRIAL EXAMINER: I think it can be assumed that whatever evidence is in course of preparation would relate to

the issues in this proceeding; but the time has come when this hearing must be brought to a conclusion. The time for the reasonable conclusion of this hearing has long since passed. Respondents' counsel, Intervenor's counsel and Staff counsel have each been given more than a reasonable amount of time in which to prepare any evidence that is now to be presented in this hearing.

MR. GOLDBERG: Mr. Examiner, may I be heard for a moment?

MR. MYSE: Before you do that, may I except to the Examiner's rulings?

MR. GOLDBERG: I for one am not willing to assume that what Mr. Myse was going to refer to is material or relevant or competent as far as the issues in this proceeding are concerned; and I submit, Mr. Examiner, that there would be no occasion under any circumstances at all to afford the Respondents any additional time—they have had more than ample time to prepare anything—even to prepare testimony that is incompetent, irrelevant and immaterial.

MR. MYSE: Mr. Examiner, I point out that because you have deprived us of an opportunity to state what that detailed [21222] evidence is, I don't see how anybody can tell whether it is material, relevant or competent, and I state to the Examiner that in our opinion it is material, relevant and competent.

TRIAL EXAMINER: The basis for the Examiner's ruling is that counsel has had an adequate time to bring forward now whatever sur-rebuttal evidence he may have, and in using the word "evidence" the Examiner is now calling for all material, competent, relevant testimony, and if counsel now states, whatever his statement should be, with regard to that relevance and materiality and competency, if he is not now prepared to go forward or state some emergency that would require the Examiner in all due rea-

sonableness to give him additional time, then counsel's proposed statement can have no effect whatever on the Examiner's ruling.

MR. MYSE: Do I understand, Mr. Examiner, that you will not permit me to state in detail what the evidence would be if we were permitted to prepare it in order to show the Examiner what the emergency is which requires additional time?

TRIAL EXAMINER: You may state what the emergency is, but I don't care to hear what it is if you are now in the course of preparing it. It makes no difference. Now is your time to come forward.

MR. MYSE: Well, the emergency is as follows: We require the additional time to prepare the testimony that I would have liked to refer to because of its nature, and its [21223] nature is as follows:

One, we would rebut and hereby offer to prove—

TRIAL EXAMINER: Wait just a minute. I think it is improper for counsel to make any statement as to what he is going to rebut.

MR. GOLDBERG: Apparently they arrive at their conclusion first and then prepare to meet that conclusion, Mr. Examiner.

TRIAL EXAMINER: Wait just a minute. Counsel apparently is again attempting to describe what his evidence would be, and the Examiner admonishes counsel to abide by the Examiner's direction and ruling.

MR. MYSE: Does that mean, Mr. Examiner, that you will not permit me to recite the evidence we would produce in order to show the Examiner the nature of the emergency that the Examiner referred to?

TRIAL EXAMINER: Will you read that statement, please?

(The statement was read.)

TRIAL EXAMINER: You can state the nature of the emergency without citing the evidence.

MR. MYSE: I state to the Examiner that I cannot state the nature of the emergency because the emergency depends upon the detailed evidence, and I am unable to go into any other detail than to recite the nature of the evidence in order to show that emergency.

[21224] **TRIAL EXAMINER:** I am certain that a recitation of the nature of the evidence is not necessary in order to conform with what the Examiner considers emergency to mean in the Examiner's ruling.

Now, if there has been any illness, or any incapacity of any witness or of counsel, or if records have been misplaced and counsel has been unable to locate them, or any other matter of that general nature and character, or any similar character, then counsel may state it. But if this is going to be a recitation of the fact that Exhibit 421 was first served on a certain date, was identified on a certain date, was received in evidence on a certain date, and testimony relating thereto was received between certain dates, there is no need to try to establish an emergency by making any such recitation.

MR. MYSE: I didn't intend to make any such recitation, Mr. Examiner.

TRIAL EXAMINER: If you would disclose what you are attempting to do, I would listen to you.

MR. MYSE: I can only do that by reciting in detail the evidence we propose to offer in this proceeding.

TRIAL EXAMINER: When you start your statement by saying, "We propose to rebut Exhibit 421," I don't think you are even making an attempt to comply with the Examiner's direction.

MR. MYSE: Do I understand the Examiner will not permit [21225] me to recite in detail the nature of the evidence we are now in the process of preparing and would produce

if given further opportunity in order that we may show the Examiner just why we need that further opportunity? Is that the Examiner's ruling?

TRIAL EXAMINER: I think it would be improper to listen to any description of the nature of the evidence under any attempt to evade the Examiner's ruling on an offer of proof.

MR. MYSE: Well, I state there is no intent on my part to evade any of the Examiner's rulings. I merely want to state to the Examiner the nature of the evidence we would produce if given an opportunity.

MR. GOLDBERG: Mr. Examiner, I submit that the Examiner has indicated what "emergency" means in his mind, and that Respondents' counsel should address himself to that directly.

TRIAL EXAMINER: Well, you may proceed to make a statement in conformity with the ruling of the Examiner.

MR. MYSE: We offer to prove, one—

TRIAL EXAMINER: Just a minute. You are not even attempting to comply with the Examiner's directions. The Examiner feels it would be improper to hear any offer of proof.

MR. MYSE: I except to Your Honor's ruling, and point out that we are thereby being deprived of a fair hearing under the Constitution and the laws of the United States.

MR. SPARKS: Mr. Examiner, I believe there are a few [21226] matters unfinished. At page 20730 and 20734—

TRIAL EXAMINER: Before we get into that matter, I understand that Respondents have no further sur-rebuttal testimony and evidence prepared and ready to offer at this time?

MR. SPARKS: It is in the course of preparation, as Mr. Myse stated to you, Mr. Examiner.

TRIAL EXAMINER: But you have none to offer at this time as you are now being called upon by the Examiner to proceed with your next witness or your next offer of evidence?

MR. SPARKS: We have none to present at this time, Mr. Examiner, for the reasons which Mr. Myse stated.

TRIAL EXAMINER: Would you be prepared to do so at 2 o'clock this afternoon?

MR. SPARKS: No, we would not, Mr. Examiner.

TRIAL EXAMINER: Would you be prepared to do so at 10 o'clock tomorrow morning?

MR. SPARKS: No, sir. Mr. Myse was attempting to state to Your Honor what we needed to do in the way of research and preparation in order to ask for a reasonable time, Mr. Examiner, and it would not be two or three days.

TRIAL EXAMINER: You might indicate how much time you do have in mind.

MR. MYSE: Well, I think, Mr. Examiner, that that requires knowledge of what we propose to offer, but I can say this: We would need at least three weeks from today to [21227] finish the research which has already been in progress, and some of which was testified to by Mr. Loane, I believe, yesterday.

TRIAL EXAMINER: All right. The Examiner merely observes you are now requesting as much time to prepare your remaining sur-rebuttal as you requested originally to prepare all of your sur-rebuttal.

MR. MYSE: That is correct, Mr. Examiner. We originally, as I recall it, requested three weeks. After, however, getting into the details of some of those matters, including those referred to by Mr. Loane yesterday, we found that the job was a much greater job, as Mr. Loane said, than we expected, and it required an analysis of hour-by-hour data for a considerable period covering the year 1946.

TRIAL EXAMINER: The Loane investigation is the principal basis for your request for three weeks' time?

MR. MYSE: No, sir, that is only one of several.

TRIAL EXAMINER: I might observe, since you mention the witness Loane, that the Examiner made a note the other day when that matter was developed on cross-examination—

MR. GOLDBERG: If the Examiner is referring to the matter that is in my mind the witness Loane stated the investigation began last week.

TRIAL EXAMINER: That is correct. That related to a determination of the cost of backfeed to Penn Water from [21228] Baltimore and Washington.

MR. MYSE: That is right, that is one of the studies which we are now engaged in and if permitted we would show that that cost of backfeed would be substantially less than 4.7 mills.

TRIAL EXAMINER: Yes, and you were served with the Staff witness' exhibit on May 23, as to Exhibit 421, and May 29 as to Exhibit 422, and more than two weeks have elapsed since Respondents were required to proceed with their sur-rebuttal testimony.

MR. GOLDBERG: Mr. Examiner, beyond that, the question of the mill rate to be used in connection with backfeed goes all the way back to Exhibit 64. In other words, the question of the propriety of any mill rate to be applied to backfeed—as to that, they have been on notice—that has been involved as long ago as when the hearing first began.

MR. MYSE: The record will show whatever that is to be the fact. I don't want to argue it, but I do want to point out that there was never any use of the 4.7 mill rate in the manner Mr. Davis used it until he used it as he did in his Exhibit 421.

I want to point out to the Examiner that we have other studies in the course of preparation in refutation of Exhibit 421 which, because of the limited staff we had available and the requirement of going ahead with cross-examination, required [21229] us to schedule these studies at intervals and that explains why the study relative to the refutation of the 4.7 mill rate was not begun until last week. We had these other studies in connection with Exhibit 421 in process of preparation for some time.

TRIAL EXAMINER: If this hearing goes on much further I think we will have to revise all of our exhibits to bring them up to date.

MR. GOLDBERG: When they say "limited staff," Mr. Examiner, that must be said with a smile. I know we have supplied at least as many as 20 copies of many of our exhibits for use by the Respondents' staff.

TRIAL EXAMINER: If the Examiner does not impose some restrictions on the hearing the Examiner is convinced, on the basis of the progress of this hearing to date, the hearing would go on for another year. You may proceed.

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[21265] **TRIAL EXAMINER:** Is there anything further before the Examiner rules that the hearing shall now be deemed concluded as to the receipt of evidence in this proceeding?

MR. MYSE: Is that directed to us generally?

TRIAL EXAMINER: Any counsel may respond.

MR. MYSE: We have stated our position on that matter this morning and I won't burden the record by restating it. I refer to the offer to show the Examiner what we had in the way of further evidence. We take exception to any ruling closing the hearing at this time.

TRIAL EXAMINER: The Examiner will set a date for the filing of main briefs which will be 90 days after July 15,

which is the date set for the final determination of corrections. Main briefs, therefore, will be filed on or before Wednesday, October 15, 1947, and reply briefs will be filed on or before Monday, November 17, 1947.

The hearing is now concluded as to the receipt of evidence and the hearing is recessed to reconvene in this room on Tuesday morning, July 15, at 10 o'clock for the purpose of the final determination of corrections to the transcript.

(Thereupon, at 4:47 o'clock P. M., the receipt of evidence was concluded, and the hearing recessed until Tuesday, July 15, 1947, at 10 o'clock A. M.)

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[21279] TRIAL EXAMINER: I understand this matter requires no ruling of the Examiner at this time. The Examiner's responsibility at this time consists of closing the record. Accordingly, under Section 1.155 of the Federal Power Commission's Rules of Practice and Regulations, effective June 1, 1938, as amended, the Examiner now declares the record in this proceeding closed, and there being nothing further to come before this hearing the Examiner proposes to adjourn sine die.

MR. SPARKS: I would like to state our exception, Mr. Examiner, to your closing the hearing at this time, on the basis stated by Mr. Myse on July 10, 1947, with regard to our offer of further proof.

TRIAL EXAMINER: The hearing is concluded and adjourned sine die.

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